Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

DOCKET NO. 71 - 706

ACTION NO. 1

LINCOLN ROY BUCKLEY and EVERLAST SAW and CARBIDE TOOLS, INC.,

Petitioners,

v.

THOMAS C. GIBNEY, Deputy District Director Immigration and Naturalization Service,

Respondent.

ACTION NO. 2

Consolidated with

EVERLAST SAW and CARBIDE TOOLS, INC., and LINCOLN ROY BUCKLEY,

Petitioners,

v.

IMMIGRATION and NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On Petition:

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ACTION NO. 1

LINCOLN ROY BUCKLEY and EVERLAST SAW and CARBIDE TOOLS, INC.,

Petitioners,

against

THOMAS C. GIBNEY, Deputy District Director Immigration and Naturalization Service for the District of New York,

Respondent.

ACTION NO. 2

EVERLAST SAW and CARBIDE TOOLS, INC., and LINCOLN ROY BUCKLEY,

Petitioners,

v.

IMMIGRATION and NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATES JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Lincoln Roy Buckley and Everlast Saw and Carbide Tools, Inc. pray that a writ of certiorari be issued

to review the decision and judgment of the United States Court of Appeals for the Second Circuit, rendered on September 17, 1971, which affirmed final judgments entered in the United States District Court for the Southern District of New York on *March 22, 1971* by the Honorable Inzer B. Wyatt, District Judge, and by the Honorable Thomas F. Croake, District Judge, dated June 16, 1971 which denied the motion of petitioners for a preliminary injunction seeking to stay the deportation of petitioner Lincoln Roy Buckley.

The opinion of the United States Court of Appeals for the Second Circuit is attached as part of the appendix to this petition and is not yet officially reported. The opinions of District Judge Inzer B. Wyatt and District Court Judge Thomas F. Croake is attached as part of the appendix to this petition and are not officially reported.

Jurisdiction

The final decision of the Court of Appeals, Second Circuit was entered on September 17, 1971.

The jurisdiction of this Court is invoked under 28 U.S. Code 1254(1).

Questions Presented

1. Does the establishment of different quota limitations for Western Hemisphere aliens based on place of birth in dependent or independent countries violate the equal protections clause of the United States Constitution and due process of law?

2. Does the establishment of different quota limitations for Western Hemisphere aliens based on place of birth violate the Civil Rights Act of the United States?

3. Does the policy of the Immigration and Naturalization Service in ordering deportation of members of a particular class (sixth preference immigrant visa category whose visas are not readily available) while withholding deportation of those persons holding third preference immigrant approvals but who also do not have visas available, violate the Equal Protection Clause of the United States Constitution?

Statutes Cited

8 U.S.C. § 1152. Numerical limitations on individual foreign states—Prohibition against preference or priority because of race, sex, nationality, place of birth, or place of residence.

(a) No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence, except as specifically provided in sections 1101(a) (27), 1151(b), and 1153 of this title: *Provided,* That the total number of immigrant visas and the number of conditional entries made available to natives of any single foreign state under paragraphs (1) through (8) of section 1153(a) of this title shall not exceed 20,000 in any fiscal year; *Provided further,* That the foregoing proviso shall not operate to reduce the number of immigrants who may be admitted under the quota of any quota area before June 30, 1968.

* * * *

IMMIGRANTS BORN IN COLONIES OF FOREIGN STATES

(c) Any immigrant born in a colony or other component or dependent area of a foreign state unless a special immigrant as provided in section 1101(a) (27) of this title or an immediate relative of a United States citizen as specified in

section 1151(b) of this title shall be chargeable, for the purpose of limitation set forth in subsection (a) of this section, to the foreign state, except that the number of persons born in any such colony or other component or dependent area overseas from the foreign state chargeable to the foreign state in any one fiscal year shall not exceed 1 per centum of the maximum number of immigrant visas available to such foreign state.

* * * * * *

8 U.S.C. 1101.

(27) The term "special immigrant" means—

(A) an immigrant who was born in any independent foreign country of the Western Hemisphere or in the Canal Zone and the spouse and children of any such immigrant, if accompanying, or following to join him: *Provided,* That no immigrant visa shall be issued pursuant to this clause until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 1182(a) (14) of this title;

* * * * * *

Public Law 89-236—Oct. 3, 1965, *Sec. 21(e) (79 Stat. 921)*

(e) Unless legislation inconsistent herewith is enacted on or before June 30, 1968, in response to recommendations of the Commission or otherwise, the number of special immigrants within the meaning of section 101(a)(27)(A) of the Immigration and Nationality Act, as amended, exclusive of special immigrants who are immediate relatives of United States citizens as described in section 201(b) of that Act, shall not, in the fiscal year beginning July 1, 1968, or in any fiscal year thereafter, exceed a total of 120,000.

* * * * * *

42 U.S.C. § 1981. Equal rights under the law (Civil Rights Act)

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to

make and enforce contracts to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

• • • • • •

U.S. IMMIGRATION AND NATURALIZATION SERVICE

OPERATIONS. INSTRUCTIONS 242.8

• • • • • •

242.10. *Voluntary departure prior to commencement of hearing.* (a) *Authorization.* Voluntary departure may, and normally shall, be granted to any alien who is statutorily eligible therefor (1) who is a native of foreign contiguous territory; or (2) whose application for extension of stay as a non-immigrant is being denied; or (3) who has voluntarily surrendered himself to the Service; or (4) who presents a valid travel document and confirmed reservation for transportation out of the United States within 30 days; or (5) who is an F-1, F-2, J-1, or J-2 nonimmigrant and who has lost such status solely because of a private bill introduced in his behalf, or is a J-1, or J-2 nonimmigrant and who has lost such status solely because of the formal filing with the Service of an application for waiver of the two-year foreign-residence requirement; or (6) (i) who is the beneficiary of an approved third-preference petition, except a J nonimmigrant subject to the foreign residence requirement who has not been granted a waiver or an alien in whose case an order to show cause was issued pursuant to the second subparagraph of OI 242.1(a), or (ii) a native of an independent country of the Western Hemisphere or the Canal Zone who has the qualifications of a third-preference alien and has applied for an immigrant visa or (iii) the beneficiary of an approved sixth-preference petition who satisfies Travel Control with-

out another petition that he can qualify for third-preference, and who cannot obtain a visa solely because a visa

number is unavailable, and his child or spouse, including a spouse who is or was a J nonimmigrant and is subject to the foreign-residence requirement; or (7) other than a native or citizen of foreign contiguous territory, who is admissible to the United States as an immigrant, who has a priority date for an immigrant visa not more than 60 days later than the date shown in the latest Visa Office Bulletin, and who has applied for an immigrant visa at an American consulate which has accepted the jurisdiction of the case; or (8) in whose case the district director has determined there are compelling factors warranting grant of voluntary departure. (*Revised*)

In cases within the jurisdiction of investigations, the authority of the district officer in charge of investigations or the officer in charge under 8 CFR 242.5 to grant or revoke voluntary departure prior to the commencement of hearing shall not be redelegated. The authority of chief patrol inspectors shall not be redelegated.

When prior approval of an application for an order to show cause is required by OI 242.1(a), the alien shall not be advised or notified that he must depart unless or until such approval has been received.

(b) *Periods of time.* (1) *General.* Except for classes (5), (6), (7), and (8) of paragraph (a), any grant of voluntary departure shall contain a time limitation of usually not more than 30 days, and an extension of the original voluntary departure time shall not be authorized except under meritorious circumstances. Upon failure to depart, deportation proceeding will be pursued. Class (5) shall be granted voluntary departure in increments of one year conditioned upon the F-1 or J-1 alien maintaining a full

course of study at an approved institution of learning, or upon abiding by the terms and conditions of the exchange program within the limitations imposed by 22 CFR 63.5(b). Class (6)(i) and (iii) shall be granted voluntary departure for an indefinite period until an immigrant visa is available, conditioned upon retention of the status established in the approved petition; class (6)(ii) shall be granted voluntary departure as provided for class (8). Class (7) shall be granted voluntary departure until the American consul is ready to issue an immigrant visa and may, in the discretion of the district director, be in increments of 30 days, conditioned upon continuing availability of an immigrant visa as shown in the latest Visa Office Bulletin and upon the alien's diligent pursuit of efforts to obtain the visa. Class (8) shall be granted voluntary departure in increments of time, not to exceed one year, as determined by the district director to be appropriate in the case. Form I-94 issued to an alien granted voluntary departure, who is within class (5), (6), (7), or (8) of paragraph (a) may be stamped with the legend "EMPLOYMENT WILL NOT AFFECT IMMIGRATION STATUS" if the alien seeks some indication from the Service that he is entitled to be employed.

(2) *Extension of voluntary departure time granted by SIO or BIA.* The district directors's authority under 8 CFR 244.2 to extend the voluntary departure time granted by a special inquiry officer or the Board of Immigration Appeals generally shall be exercised in behalf of an alien who is the parent, spouse, or child of a United States citizen or permanent resident alien if the facts in the case

warrant such action, or for an alien whose case falls within the purview of OI 242.10(a)(6), (a)(7), or (a)(8).

• • • • • •

Statement of the Case

Petitioners instituted an action at law (Action No. 1) in the United States District Court for the Southern District of New York for a declaratory judgment seeking to set aside the deportation of Buckley on the grounds that deportation of Buckley violates certain constitutional rights.

A preliminary injunction to stay deportation pending trial was denied by Judge Inzer B. Wyatt on March 22, 1971.

A motion for Stay of Deportation was denied by the Circuit Court of Appeals on April 12, 1971 for the Second Circuit, sitting were Judges Sterry R. Waterman, J. Joseph Smith and Irving R. Kaufman.

A Stay of Deportation was denied by Mr. Justice Harlan on April 16, 1971.

In Action No. 2 petitioners Buckley and Everlast, instituted an action for a declaratory judgment seeking to set aside respondents' denial of a third preference immigrant visa as arbitrary, capricious and unreasonable.

Judge Thomas F. Croake sitting in the United States District Court for the Southern District of New York denied on June 16, 1971 a motion for a preliminary injunction staying deportation pending a trial on the declaratory judgment action.

A motion granting a stay of deportation pending appeal was granted by the Circuit Court of Appeal for the Second Circuit, also the two actions were ordered consolidated for purposes of appeal. (Sitting on this panel were Judges Henry J. Friendly; J. Edward Lumbard, and James L. Oakes.

Petitioners appealed to the Court of Appeals for the Second Circuit. A panel of that court (Kaufman, Anderson and Feinberg affirmed the decisions of Judge Wyatt and Judge Croake with a *per curiam* decision.

Facts

Petitioner Buckley, age 43, a native of British Honduras, and a citizen of the United Kingdom and Colonies, was admitted to the United States as a non-immigrant visitor for pleasure on or about September 16, 1967. He was authorized to remain in this country until February 26, 1968. His deportability was conceded and the special inquiry officer granted him the privilege of voluntary departure on June 16, 1970, to depart on or before July 16, 1970, when the provision that in the event he failed to depart when and as required, he should be deported to British Honduras.

Buckley is employed by petitioner Everlast, who filed and received a sixth preference immigrant visa approved on behalf of Buckley.

Since Buckley was born in a dependent country of the Western Hemisphere, he cannot possibly obtain a visa in his lifetime due to 8 U.S.C. 1152(c) which imposes on persons born in dependent areas of a foreign state a limitation of 1% or 200 visas annually.

Reasons for the Allowance of the Writ

The allowance of the writ of certiorari is urged for the following reasons:

(1) That persons born in dependent countries of the Western Hemisphere are discriminated against by two statutes, 8 U.S.C. Sec. 1152(c) and Section 21(e) Act of October 3, 1965 (Public Law 89-236), Immigration and Nationality Act (79 Stat. 921).

(A) The first statute, limits to dependent countries in the Western Hemisphere a maximum of 200 visas annually.

(B) The second statute creates a quota from independent countries in the Western Hemisphere of 120,000 visas annually.

(2) Buckley is also denied the benefits of being a special immigrant. Section 101(a)(27)(A) of the Act, 8 U.S.C. § 1101(a)(27)(A). This is an unconstitutional denial since he was born in the Western Hemisphere and should be classified as a "special immigrant".

These statutes are clearly discriminatory and violate constitutional rights.

(3) Buckley, although an alien is entitled to equal rights under the Law of the Civil Rights Act (42 U.S.C. 1981).

(4) The policy of deporting sixth preference aliens and not third preference aliens violates the equal protection clause of the United States Constitution.

POINT I

The establishment of different quota limitations for Western Hemisphere aliens based on place of birth in dependent or independent countries violates the United States Constitution and due process of law.

Immigration visas to natives born in a dependent area of a foreign state of the Western Hemisphere are limited to one per centum (200) of the total immigration visas available to that foreign state. (8 U.S.C. § 1152 (A)(C)). Immigration visas to natives born in independent countries of the Western Hemisphere are subject only to an annual hemisphere quota of 120,000 (79 Stat. 921). Immigration and Nationality Act. The Act of Oct. 3, 1965 (Public Law 89-236, Section 21(E)).

The treatment of aliens from the same class (aliens born in independent countries of the Western Hemisphere) in a different manner than those born in dependent countries of the Western Hemisphere) is unreasonable and irrational and therefore violates the Equal Protection Clause of the United States Constitution.

In addition, the discrimination against aliens from dependent areas, as indicated is violative of due process.

Evidence that the statutes cited above are unconstitutional can be found in The Senate Report on Amendments to the Immigration and Nationality Act in which it was stated:

> "Not only is the committee concerned with the volume of the immigration but it has difficulty with reconciling its decision to eliminate the concept of an alien's place of birth determining the quota to which he is charged with the exemption from the numerical limitation extended to persons born in the Western Hemisphere" U. S. CONGRESSIONAL AND ADMINISTRATIVE NEWS (1965) Senate Report No. 748. P. 3336.

Also see:

> "The Undemocratic, Illogical and Aritbrary Immigration Laws of the United States," by Jack Wasserman, Esq. Published in the "International Lawyer #2. Vol. 3. (January 1969) by the American Bar Association.

POINT II

The establishment of different quota limitations for Western Hemisphere aliens based on place of birth violates the Civil Rights Act of the United States.

42 United States Code commonly referred to as the Civil Rights Act in section 1891 gives to all persons within the jurisdiction of the United States the full and equal benefit of all laws and proceedings. Therefore violations of the plaintiff's rights under the United States Constitution are a violation of the Civil Rights Act and should not be permitted by the Court.

Section 202(c) of the Act, 8 U.S.C. 1152(c). Section 101(a)(27)(A) of the Act, 8 U.S.C. § 1101(a)(27)(A). Section 21(e) of the Act of October 3, 1965, 79 Stat. 929.

These statutes violate Buckley's civil rights since his place of birth alone dictates what classification he is given

and what treatment at the hands of respondent he is to receive.

The Western Hemisphere has the same basic negro culture. The ethnic grouping is the same.

Why should a distinction be made due to a person's place of birth whether he can immigrate to the United States or not?

POINT III

The action of the Immigration and Naturalization Service in seeking to deport Buckley while withholding deportation proceedings regarding those similarly situated violates the Equal Protection Clause of the United States Constitution.

Aliens are persons within the provisions of the Fifth Amendment and may not be deprived either by the Federal or State Government of life, liberty, or property without due process of law. Nor may aliens be denied the equal protection of the laws. *Trau* v. *Raich*, 239 U. S. 33; *Harisades* v. *Shaughnessy*, 342 U. S. 580; *Whithfield* v. *Hanges*, 222 F. 745.

As Justice Douglas stated:

> "An alien who is assimilated in our society, is treated as a citizen so far as his property and his liberty are concerned. He can live and work here and raise a family, secure in the personal guarantees every resident has and safe from discrimination that might be levelled against him because he was born abroad." *Harisades* v. *Shaughnessy*, 342 U. S. 580.

When dealing with the constitutional rights of an alien the federal government must therefore be certain not to deprive aliens of equal protection under the law, either by the actions of Congress or by the actions of agencies which

act pursuant to powers delegated by Congress. In this case the agency involved is the Immigration and Naturalization Service. The underlying concept with regard to equal protection is that the classification of persons or property under the law must be reasonable. The classification must be rational and have some reasonable relation to the objectives set forth by the legislation. The objective of the classifications must be the accomplishment of a proper legislative purpose or policy and all persons within the classes established must be treated equally.

When an administrative body applies a statute, it can not deprive aliens of equal protection under the law under the guise of administrative policy.

The New York office of the Immigration and Naturalization Service has established a policy with regard to deportation of aliens. The unreasonableness of which, demonstrates it is violative of equal protection.

The Immigration and Naturalization Service does not institute deportation proceedings against persons holding a third preference visa approval whereas they do institute deportation proceedings against persons holding sixth preference visa approval (See Operations Instructions 6(i)(iii) 242.10(a) printed *supra,* at pp. 5 and 7).

The irrational use of the third and sixth preferences as a method of distinction results in persons who fall within the class of aliens being treated unequally. An examination of the parties within the third and sixth preferences demonstrates such classifications are irrational, arbitrary and unreasonable. An alien holding a sixth preference visa approval (the plaintiff) is ordered deported while a person from the same country as himself holding a third preference visa approval does not have deportation proceedings instituted against them (See Operations Instructions 242.10(h)(1), Class (6)(i)(iii) printed, *supra,* at pp. 6 and 7).

CONCLUSION

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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On Petition:

CHARLES A. GIULINI, JR.,
JAMES CARDIELLO.

Appendix A

Per Curiam Opinion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 147-8—September Term, 1971.

(Argued September 17, 1971 Decided September 17, 1971.)

Docket Nos. 71-1342, 71-1666

LINCOLN ROY BUCKLEY and EVERLAST-SAW AND CARBIDE TOOLS, INC.,
Plaintiffs-Appellants,

v.

THOMAS C. GIBNEY, Deputy District Director Immigration and Naturalization Service for the District of New York,
Defendant-Appellee.

EVERLAST SAW AND CARBIDE TOOLS, INC., and LINCOLN ROY-BUCKLEY,
Plaintiffs-Appellants,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Defendant-Appellee.

Before:

KAUFMAN, ANDERSON and FEINBERG,
Circuit Judges.

Appendix A.

Consolidated appeal from an order of the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge*, denying an alien's motion for a preliminary injunction staying his deportation pending the determination of a declaratory judgment action seeking to set aside a deportation order, and from an order of the same court, Thomas F. Croake, *Judge*, denying a motion for a preliminary injunction staying deportation pending the determination of a declaratory judgment action seeking to set aside the denial of a third-preference immigrant visa. Both orders affirmed.

CHARLES A. GIULINI, JR., Brooklyn, N. Y., *for Plaintiffs-Appellants.*

JOSEPH P. MARRO, Special Assistant U. S. Attorney, New York, N. Y. (Whitney North Seymour, Jr., U. S. Attorney for the Southern District of New York, Stanley H. Wallenstein, Special Assistant U. S. Attorney, New York, N. Y., of counsel), *for Defendants-Appellees.*

PER CURIAM:

The order of Judge Wyatt is affirmed on the basis of his opinion below, —— F. Supp. ——, and the order of Judge Croake is affirmed on the basis of his memorandum below.

Appendix B

Decision of J. Wyatt.

WYATT, District Judge,

This is a motion (heard on February 16, 1971) by Lincoln Roy Buckley and by Everlast Saw and Carbide Tools, Inc. (Everlast) for a preliminary injunction to stay the defendant Thomas Gibney, Deputy District Director of the Immigration and Naturalization Service (Service), from enforcing a warrant of deportation issued against Buckley on January 18, 1971. In response, an Assistant United States Attorney, representing Deputy District Director Gibney, filed an affidavit contesting Buckley's claims and requesting that the complaint be dismissed. The administrative file has also been submitted.

There is substantial agreement concerning the events out of which this action arose.

Buckley came to the United States as a visitor for pleasure (8 U.S.C. § 1101(a)(15)(1B); 8 CFR § 214.2(b)), entering the country on September 16, 1967. Soon thereafter, he accepted his present job in New York City. This was a violation of a condition for his entry into this country and made Buckley deportable under 8 U.S.C. § 1251(a)(9). His visa for a pleasure visit authorized Buckley to remain in the United States until October 15, 1967. He applied for an extension, evidently by deceiving the Service, and secured an extension until February 28, 1968.

In early 1968, Buckley applied for and received a certification from the Secretary of Labor under 8 U.S.C. § 1182 (a)(14). This certification was that there were not sufficient workers in the United States who were able, etc. to do the type of work that Buckley was capable of performing and that Buckley's employment would not adversely affect the wages or working conditions of those workers already in the United States. This certification satisfied

one of the conditions for Buckley to receive a visa. 8 U.S.C. § 182(a).

On April 12, 1968, Everlast, Buckley's employer, filed a petition on Buckley's behalf for a visa under 8 U.S.C. § 1153(a)(6), "skilled or unskilled labor" in the words of the statute and sometimes called a "sixth preference visa". This petition was approved by the Service on February 5, 1969. This approval meant that Buckley could receive a sixth preference visa when and if one became available for that class. It is extremely unlikely, however, that any visa will be available in the foreseeable future to citizens of British Honduras each year. 8 U.S.C. § 1152(a)(c). According to the affidavit of an Assistant United States Attorney, these two hundred visas are all taken up by those in the first preference class; thus, there is little reason to expect that Buckley, with a sixth preference, will ever be able to get a visa. It was doubtless for this reason that Buckley remained in the United States, despite the fact that his visitor's visa was no longer valid.

On June 9, 1970, the Service initiated deportation proceedings against Buckley by issuing an order to show cause. It was averred (properly it seems) that Buckley was in the country in violation of law and could be deported under 8 U.S.C. § 1251(a)(2). A hearing was held before a Special Inquiry Officer of the Service on June 16, 1970. At that time Buckley, who was then represented by counsel, admitted that he was deportable. He was granted voluntary departure (8 U.S.C. § 1254(e)) on the condition that if he did not leave the country on or before July 16, 1970 he would be deported. Buckley waived his right to appeal and the order became final. 8 CFR § 242.20.

Before the July 16 date, Buckley submitted motion papers requesting an extension of time for voluntary departure, a stay of deportation, and a reopening of the deportation proceedings. The basis for these requests was

that he should be granted a status adjustment under 8 U.S.C. § 1255. The cited section permits the Attorney General to adjust the status of certain aliens "to that of an alien lawfully admitted for permanent residence."

As to that part of the motion requesting that the proceedings be reopened, there was a referral to a Special Inquiry Officer. On July 17, 1970, he denied the motion on the ground that Buckley was "statutorily ineligible for adjustment of status by reason of the unavailability of" immigration visas to those other than those with first preference. Buckley appealed his decision to the Board of Immigration Appeals which affirmed the order on December 11, 1970.

Meanwhile, that part of the motion requesting an extension of time for voluntary departure and for a stay of deportation had been denied by an Assistant Deputy District Director for Deportation on July 7, 1970. He also noted that Buckley was not eligible for status adjustment under 8 U.S.C. § 1255.

On January 18, 1971, the Deputy District Director issued a warrant for Buckley's deportation. On January 20, 1971, the Service notified Buckley that he was to report for deportation on February 2, 1971.

By motion filed on January 28 and directed to the District Director and Special Inquiry Officer, Buckley requested reinstatement of voluntary departure, a stay of deportation, and a reopening of the deportation proceeding, with permission to argue orally before the Board of Immigration Appeals if his motion were denied. On January 29, 1971, the Deputy District Director denied the motion as to a request for voluntary departure and for a stay. The application to reopen the proceedings was directed to the Board as was at that point required by 8 CFR § 3.2. On February 5, 1971, the Board filed an order denying this application.

On February 1, 1971, Buckley filed a petition for review in the Court of Appeals, Second Circuit (Docket No. 71-1104). This automatically stayed his deportation. 8 U.S.C. § 1105(a)(3) On February 4, 1971, he stipulated to withdraw this petition with prejudice.

On the day his petition to the Court of Appeals was withdrawn, Buckley commenced this action and obtained from Judge Bryan an order to show cause with a temporary restraining order, staying his deportation.

Buckley asserts numerous grounds for a preliminary injunction. He claims that he is being deprived of due process and equal protection in that the Service often stays deportation and grants voluntary departure to holders of approved third preference petitions but refused to grant it to him. (He holds an approved sixth preference petition). He contends that these same constitutionally protected rights were also violated in that, as a native of a dependent area (British Honduras is a British dependency), he was subject to different quota requirements than he would have been had he been a citizen of an independent country. Accordingly to Buckley's complaint, these same requirements also violate the Civil Rights Act. Buckley next contends that deportation is cruel and unusual punishment and therefore is in violation of the Eighth Amendment. Finally, he has a meaningless complaint about execution of an order "while a motion and subsequent appeal was pending".

Buckley's employer, Everlast, also requests a preliminary injunction, apparently on the ground that to deport Buckley would be an interference with its employment contract with Buckley.

The claims of these movants are without merit. The motion will be denied.

Movants assert jurisdiction under several statutes. 8 U.S.C. § 1329 confers jurisdiction of "all causes, civil and

criminal, arising under any of the provisions of this sub chapter" on the United States District Courts. There is jurisdiction under that statute. *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U. S. 206 (1968).

Buckley's first claim is based on his belief that it was improper for the Service to deny his application for a stay of deportation and voluntary departure when, he asserts, it is the practice to grant there requests to beneficiaries of approved third preference petitions. The Service admits that it is the normal practice to grant "voluntary departure for an indefinite period until an immigrant visa is available" [Operation Instruction 242.10(b)(1)] to any alien (with a few exceptions not relevant here) "who is the beneficiary of an approved third-preference petition" [Operation Instruction 242.10(a)(6)(i)] or who is "the beneficiary of an approved sixth-preference petition who satisfies Travel Control . . .. that he can qualify for third preference and who cannot obtain a visa solely because a visa number is unavailable". [Operation Instruction 242.10(a)(6)(iii)]. Authority to promulgate these Operation Instructions was delegated to the Commissioner of Immigration and Naturalization by the Attorney General pursuant to 8 CFR § 2.1.

Clearly Buckley can claim no rights under Operation Instruction 242.10(a)(6)(i); he does not hold an approved third preference petition. He likewise can claim no benefit from Operation Instruction 242.10(a)(6)(iii) because he has not satisfied (and could not satisfy) Travel Control that he can "qualify for third preference".

Buckley cannot qualify for third preference. Third preference is accorded to "members of the professions" and those with "exceptional ability in the sciences or the arts". 8 U.S.C. § 1153(a)(3).

In the context of this statute, the term "professions" includes architects, engineers, lawyers, physicians, and

teachers. 8 U.S.C. § 1101(a)(32). Although undoubtedly other callings could be included in the term, the job of mechanic and tool maker is not generally considered one of the "professions" and should not be included in that term.

It is more plausible to argue that a highly skilled mechanic and tool maker like Buckley is one with "an exceptional ability in the arts or the sciences". It would require, however, a radical expansion of the terms "the sciences" and "the arts" to include a mechanic and tool maker. Such an expansive reading of these terms is not suggested by the statute, which provides for those with skills such as those of Buckley by granting them a sixth preference visa. This sixth preference is granted, among others, to those "who are capable of performing specific skilled . . . labor". 8 U.S.C. § 1153(a)(6). Buckley, a mechanic and tool maker, clearly comes within the sixth preference category of "skilled . . . labor" and not in the third preference category of professionals, scientists, and artists.

Furthermore, even had Buckley qualified for third preference, he would not necessarily have been granted the privilege of voluntary departure. Operation Instruction 242.10. The evidence shows that a refusal to grant this privilege to Buckley would not have amounted to any abuse of discretion. Buckley had entered the country as a visitor and had almost immediately violated a condition of his visa by beginning to work for Everlast. He was later granted the privilege of voluntary departure; he failed to take advantage of it. His family is in British Honduras. There is ample reason for the exercise of discretion to refuse the privilege of voluntary departure to someone who had abused other privileges previously extended to him.

Buckley did not qualify for indefinite voluntary departure under the Operation Instructions issued by the Commissioner of Immigration and Naturalization and the evi-

dence before this Court indicates that he never could have so qualified. Any claim that these instructions were applied to him in the discriminatory fashion must fail.

It appears that Buckley is really contending that the distinction drawn by the Operation Instructions between those who qualify for third preference visas and those highly skilled laborers who (like Buckley) qualify for sixth preference visas is arbitrary and unreasonable. The same distinction was drawn by Congress in the statute itself; those who qualify for a third preference are directed to be allotted immigration visas before those who qualify for a sixth preference (8 U.S.C. § 1153). The Operation Instructions simply use the order established by Congress as a basis for determining whether voluntary departure should be granted. It is not arbitrary or unreasonable to give a greater preference to members of the "professions" and to highly skilled scientists or artists than that given to skilled laborers.

The Service has the right to grant the privilege of voluntary departure to those who are felt to be deserving of this privilege. 8 U.S.C. § 1254(e); 8 CFR § 224. The Service has established a rational basis for deciding when this benefit should be extended; adherence to the rules means that the privilege is not extended to Buckley. Neither the rules nor their application to Buckley violate any constitutional right possessed by this alien.

Next, Buckley claims that as a native of a dependent area in the Western Hemisphere he is being discriminated against because there are different quota limitations on dependent areas than on independent countries.

There are indeed such differences. Immigration visas to natives of the dependent area of a foreign state are limited to one per centum of the total immigration visas available to that foreign state. 8 U.S.C. § 1152(c). This means that no more than 200 immigration visas can be given to natives of any dependent area. 8 U.S.C. § 1152(a).

At the same time, Congress has provided that natives of independent countries of the Western Hemisphere are subject only to an annual hemisphere quota of 120,000 (79 Stat. 921).

That Congress has established differing quotas for immigrants, depending on whether they are natives of dependent areas or of independent countries, is not unconstitutional. "The exclusion . . . of aliens pursuant to statute falls within that category of policy decisions which 'so far as the subjects affected are concerned, are necessarily conclusive upon all . . . [the government's] departments and officers', including 'the judiciary'." *Hitai* v. *Immigration and Naturalization Service*, 343 F. 2d 466, 467 (2d Cir.), cert. denied, 382 U. S. 816 (1965) quoting *The Chinese Exclusion Case*, 130 U. S. 581, 606 (1889). Congress has made the distinction. It was entirely within its power in so doing. This Court ought not to interfere in such a policy decision.

Buckley also contends that to deport him would violate his rights under the "Civil Rights Act of 1870". Apparently he is referring to 42 U.S.C. §§ 1981—2000h-6 when he speaks of the "Civil Rights Act". Sections 1981 and 1983 are the only applicable sections. Section 1981 provides that the same rights and privileges under the law shall extend to all persons within the jurisdiction of the United States. Section 1983 establishes a civil cause of action for those whose rights have been invaded.

It is difficult to see how Buckley has been deprived of any right or privilege. He has raised no objection to the conduct of the various proceedings before the immigration authorities and the records of these proceedings establish that they met the requirements of procedural due process. This alien has not shown any violation of his rights; he has been leniently treated under valid immigration statutes and regulations. His claim under the Civil Rights Act is without basis.

Next, Buckley asserts that deportation is cruel and unusual punishment in violation of the Eighth Amendment. This argument is completely without merit. Deportation has been "consistently classified as a civil rather than a criminal procedure." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593 (1951). Thus, even though it may have severe consequences, deportation is not punishment for a crime but a method of returning to his own country an alien not entitled to remain here. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730 (1892); *Cortez* v. *Immigration and Naturalization Service*, 395 F.2d 965, 967 (5th Cir. 1968); *Burr* v. *Immigration and Naturalization Service*, 350 F.2d 87, 91 (9th Cir. 1965), cert. denied, 383 U.S. 915 (1966). Since it is not punishment, deportation cannot be cruel and unusual punishment.

Finally, Buckley has a claim in meaningless words which seem to say that he is permitted to appeal the Board's December 11, 1970 order within six months from that date and that to deport him before his appeal time expires is to deprive him of his right to appeal. This contention is dubious at best; if accepted, it would mean that a person threatened with deportation could indefinitely postpone deportation by simply filing motions and appeals at the proper time. More importantly, Buckley no longer has any right to appeal the December 11, 1970 decision because he did file a petition for review with the Court of Appeals and on February 4, 1971 stipulated to withdraw that petition with prejudice.

Although not mentioned in either the complaint or in the affidavits, movant's brief contains an allegation that Buckley is being deported "in accordance with . . . secret rules and regulations" (Plaintiffs' Memorandum of Law, at 22). These "secret rules and regulations" are identified as the Commissioner's Operation Instructions. Buckley is not being deported, however, under any Operation Instructions; he is being deported under the statute, 8 U.S.C.

§ 1251(a)(2), because he is illegally in the country. These Operation Instructions affect Buckley only insofar as they serve as a guide in considering his request for voluntary departure; their only effect is that they fail to recommend the extension of the privilege of voluntary departure to beneficiaries of approved sixth preference petitions. The Operation Instructions do not require that requests by such beneficiaries be denied; they simply encourage the granting of requests by beneficiaries of greater preferences. Buckley has not been injured by these Operation Instructions and may not avoid being deported on the ground that he did not know the contents of these instructions.

Everlast also requests this preliminary injunction. It asserts that to deport Buckley would interfere with its contractual relations with him. Granting this to be true, it is difficult to see from this fact any reason to stay a warrant of deportation for an alien illegally in this country. The fact that Everlast hoped to continue to benefit from Buckley's illegal presence in the United States is not sufficient reason to allow him to remain in the country.

The foregoing contains the findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a).

The motion for a preliminary injunction is denied and the temporary restraining order is vacated.

So Ordered.

Dated: New York, New York, March 22, 1971.

INZER B. WYATT,
United States District Judge.

Appendix C

Decision of J. Croake.

ENDORSEMENT

EVERLAST SAW AND CARBIDE TOOLS, INC. and LINCOLN ROY BUCKLEY, Plaintiffs, v. IMMIGRATION AND NATURALIZATION SERVICE. 71-Civ. 2315

Plaintiffs in the above captioned matter have moved pursuant to Rule 65 of the Federal Rules of Civil Procedure for a preliminary injunction enjoining defendants from enforcing an order of deportation against Lincoln Roy Buckley. The motion is denied.

The claims raised by plaintiffs in their motion papers have already been decided against them by Judge Wyatt in a memorandum decision dated March 22, 1971. It may well be that this result will work a hardship upon them, but it is clearly in accord with the governing law.

For over a year now, deportation proceedings against the plaintiff Buckley have been underway. During this time, he has been treated most leniently by the courts with full respect for his constitutional rights. Now the time has come to terminate this litigation.

Accordingly, for the reasons outlined by Judge Wyatt in his decision of March 22, 1971, plaintiff's request for a preliminary injunction is denied.

SO ORDERED.

Dated: New York, N. Y., June 16, 1971.

THOMAS F. CROAKE,
Thomas F. Croake,
U.S.D.J.

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No. 71-706

In the Supreme Court of the United States

OCTOBER TERM, 1971

LINCOLN ROY BUCKLEY AND EVERLAST SAW AND CARBIDE TOOLS, INC., PETITIONERS

v.

THOMAS C. GIBNEY, DEPUTY DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, FOR THE DISTRICT OF NEW YORK

EVERLAST SAW AND CARBIDE TOOLS, INC. AND LINCOLN ROY BUCKLEY, PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

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The facts are fully set forth in the opinion of District Judge Wyatt (Pet. Apps. B) and are not in dispute. Essentially, the individual petitioner, Lincoln Roy Buckley, a citizen of British Honduras, entered the

United States legally as a visitor on September 16, 1967, with permission to remain one month. In violation of the conditions of his entry he obtained employment in the United States and remained. Through various administrative and judicial proceedings he has attempted to prolong his stay (Pet. App. 17–20), but he has never become eligible for immigration nor has he any immediate prospect for becoming eligible.[1]

On January 18, 1971, the Deputy District Director issued a warrant for Buckley's deportation and on January 20 Buckley was directed to report for that purpose on February 2, 1971 (Pet. App. 19).

On February 4, 1971, Buckley and Everlast, his employer, filed in the United States District Court for the Southern District of New York the first of the two actions here involved (71 Civ. 470). The suit requested, *inter alia*, on various grounds, a preliminary injunction staying the enforcement by the Deputy District Director of the January 18 warrant of deportation (Pet. App. 20). On March 22, 1971, District Judge Wyatt, in an exhaustive opinion, found petitioners' various claims meritless, denied the requested injunction, and vacated a previously entered temporary restraining order (Pet. App. 17–26).

[1] 8 U.S.C. 1152(a) limits the visas available to any single foreign state to 20,000 per annum. Section 1152(c) charges persons born in dependencies to the governing independent state and limits the visas available to a dependency to one per cent of the maximum number available to the independent state. British Honduras, being a dependency of Great Britain, is thus statutorily entitled to a maximum of 200 immigrant visas annually, and those 200 are continually exhausted by applicants having higher preference status than petitioner (Pet. App. 17–18).

While the latter action was pending, Everlast sought on Buckley's behalf an administrative determination that Buckley was eligible for third preference classification for visa purposes ("qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States," 8 U.S.C. 1153(a)(3)). The application was denied by the Deputy District Director on February 23, 1971, and an appeal from that determination was dismissed by the Regional Commissioner on May 17, 1971 (R. 5, p. 4).[2] On May 25, 1971, petitioners filed in the district court a second civil action (71 Civ. 2315), requesting a declaratory judgment that Buckley qualifies for third preference status and a preliminary injunction staying enforcement of the deportation order pending determination of the principal action (R. 1, 2). On June 16, 1971, District Judge Croake, in a memorandum opinion, found that petitioners' claims had already been decided against them by Judge Wyatt and denied the requested injunction for the reasons stated in Judge Wyatt's opinion (Pet. App. 27).

The court of appeals affirmed both orders on the basis of the respective accompanying opinions (Pet. App. 15–16).

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[2] "R." refers to the record in Civil Action No. 71 Civ. 2315, S.D.N.Y., the second of the two proceedings involved. Both it and the record of the first action (71 Civ. 470) are on file in the Clerk's office.

Each of petitioners' contentions is answered in Judge Wyatt's carefully considered opinion (Pet. App. 17–26), on which we rely. We merely note two points which should be particularly stressed. With respect to petitioners' claim that the establishment of different quota limitations for Western Hemisphere aliens, depending upon whether they were born in dependent or independent countries, violates due process (Pet. 10–11), we note the plenary and unfettered character of Congress' constitutional authority to prescribe the terms under which aliens may be admitted to this country.[3] With respect to the contention that the Service's Operating Instructions improperly distinguish between possessors of third preference and sixth preference immigrant status in giving guidance to Service officers as to whether and for how long to extend the privilege of voluntary departure to aliens found to be deportable (Pet. 12–13), we emphasize that the Instructions are merely guidelines for the exercise of discretion, not hard and fast rules, so that even if Buckley had qualified for third preference status he would not necessarily have been granted the privilege of voluntary

[3] See, *e.g.*, *Boutilier* v. *Immigration and Naturalization Service*, 387 U.S. 118, 123; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588–589; *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542; *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425; *Turner* v. *Williams*, 194 U.S. 279, 289–290; *The Japanese Immigrant Case*, 189 U.S. 86, 97; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 704–713; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659; *The Chinese Exclusion Case*, 130 U.S. 581, 603–604; *Hitai* v. *Immigration and Naturalization Service*, 343 F. 2d 466, 467–468 (C.A. 2), certiorari denied, 382 U.S. 816.

departure—either for a definite or an indefinite period. Here, as Judge Wyatt noted (Pet. App. 22–23), there was ample reason for the Service, after Buckley had been granted the privilege of voluntary departure and had abused it, to decline to extend the privilege to him again.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.

GOVERNMENT PRINTING OFFICE: 1972